VIRGINIA SECTION

THE LIEN THEORY OF A MORTGAGE OR DEED OF TRUST.—It is familiar learning that on execution of a mortgage or deed of trust, the legal title to the *res* vests in the mortgagee or trustee, the equitable title alone remaining in the mortgagor or debtor-grantor. This situation, however, has been lost sight of in many of the States—particularly of the West—and save as against the mortgagee himself, the legal title is regarded as *remaining in the mortgagor*. In short, the mortgage is treated as a mere *lien* on the estate, even at law—thus borrowing the equitable theory of a mortgage.[1]

In Virginia, the distinction between the *legal* title of the *mortgagee* and the *equitable* title of the *mortgagor*—or what is the same thing, between the equitable title of the *grantor* and the legal title of the *trustee* in a deed of trust to secure debts—has been sharply maintained.[2]

But in the more recent case of *Gravatt* v. *Lane*,[3] the Virginia Court has adopted, inadvertently as is believed, the *'lien theory'* of the mortgage, in holding that an outstanding deed of trust, *unsatisfied*, offers no impediment to the maintenance of *ejectment* by the debtor-grantor against an adverse tenant. The Virginia case cited as authority [4] was the case of a *satisfied* trust—a wholly different situation. It is an accepted theory that an action of ejectment by the former holder of the legal title, may not be defeated by proof of an outstanding *satisfied* trust.[5] But in the case under criticism the trust was an *unsatisfied* one. Should the trustee of the unsatisfied trust now bring ejectment against the prevailing plaintiff, the court would be driven to hold that the trustee could not recover, in spite of historical analogies in Virginia, and of the implication of Va. Code 1919, § 5472, that in such case the trustee of a *satisfied* trust shall not recover in ejectment against the mortgagor or grantor.

The *'lien theory'* of a mortgage or deed of trust, is supposed to have originated in the so-called "Code States," where the question

[1] Mr. Pomeroy's treatment of the varying conceptions of a mortgage in the several states is full and complete. 3 POMEROY, EQ. JURISP. 1186, *et seq.*

[2] Faulkner *v.* Brockenbrough, 4 Rand. 245 (1826); Claytor *v.* Anthony, 6 Rand. 285 (1828); Coutts *v.* Walker, 2 Leigh 268, 280 (1830); 4 MINOR'S INST. (3d. ed.) 1018. But see Spence *v.* Repass, 94 Va. 716, 4 Va. Law Reg. 255 (editorial note) (1897); Van Ness *v.* Hyatt, 13 Pet. (U. S.) 294 (1839); Va. Code 1919, §§ 5472, 2742 (prohibiting mortgagee to recover in ejectment "where the debt has been paid").

[3] 121 Va. 44 (1917).

[4] Watson *v.* Ward, 6 Munf. 38 (1817).

[5] See Young *v.* Bradley, 101 U. S. 782 (1879); Robinson *v.* Pierce (Ala.), 24 So. 984 (1898).

whether title is legal or equitable is of little or no consequence. But the question is a vital one in those States, as in Virginia, where the distinction between law and equity, and legal and equitable titles, has been rigidly maintained from earliest times. See the more recent case of *Grizzle* v. *Fletcher*,[6] where the Virginia Court held that the equitable owner (and the mortgagor, or grantor, in an unsatisfied mortgage is but equitable owner) of an insurance policy, could not maintain an action at law thereon, because of his merely equitable title—a highly technical but quite sound ruling.

The conflict between the "legal title theory" and the "lien theory", in the case of outstanding *unsatisfied* mortgages and deeds of trust, is of special importance in actions on the case at law, for tortious injury to the mortgaged property. If, in Virginia, for example, the *mortgagor* or (grantor-debtor in a deed of trust) may maintain an action at law against a railway company for the burning of fences or houses, or forests, on the mortgaged estate, what defence may the railway company make, when the *mortgagee* or *trustee* later institutes his action for damages for the same injury, standing on his own legal title? This question becomes all the more important where the injury done reduces the value of the security to a point *below the amount of the debt secured.*

On the whole, this departure from ancient landmarks is to be deprecated as likely to open the door to innumerable difficulties in the future, practical as well as theoretical. To illustrate: A executes to T, a deed of trust, on his house and lot to secure B $20,000—the house worth $15,000 and the lot $10,000. By the negligence of X, the house is destroyed by an explosion: Who, under the doctrine of *Gravatt* v. *Lane*, may sue at law for the destruction of the house? If the debtor may sue and recover the full amount of damages suffered, the creditor's rights are seriously impaired. If, on the other hand, the trustee is the proper plaintiff, the rights of all parties are properly protected, and ancient landmarks of the law are preserved. How may we reconcile this conclusion with *Gravatt* v. *Lane?*

W. M. LILE.

ACCESSARIES, WHEN AND WHERE TRIED; HOW INDICTED.—Section 4766, Code 1919, provides that,

> "An accessary, either before or after the fact, may, *whether the principal felon be convicted or not,* or be amenable to justice or not, be indicted, convicted and punished in the county or corporation in which he became accessary, or in which the principal felon might be indicted. Any such accessary before the fact may be indicted either with such principal or separately." (Italics ours.)

[6] 127 Va. 663 (1920).